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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re A.H. et al., Persons Coming Under the
Juvenile Court Law

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Petitioner and Respondent,

v.

ROBERT H.,

Objector and Appellant.

A139451, A140604

(Alameda County Super. Ct.
Nos. 0J12019661, 0J12019662)

Robert H. (Robert) is the one-time boyfriend of the mother of male minors Am. H. (Am) and Az. H. (Az) (collectively, minors). In dependency proceedings held pursuant to Welfare and Institutions Code section 300,¹ the juvenile court designated him as the minors' alleged father. Robert subsequently requested that he be designated the presumed father of each child pursuant to Family Code section 7611, subdivision (d).² The court denied his requests. It concluded that, although Robert qualified for the presumption, it was rebutted pursuant to section 7612, subdivision (a) by Robert's repeated and egregious sexual abuse of Am's and Az's two minor female half siblings.

¹ We have previously consolidated his separate appeals regarding Am and Az.

² All further statutory references are to the Family Code unless otherwise stated.

Robert appeals from the court's denial of his requests. He argues the court erred, primarily because there was no allegation that he sexually abused Am and Az. He also contends that he qualifies for presumed father status pursuant to other law.

Respondent, the Alameda County Social Services Agency (Agency), argues that Robert's appeals are moot and his appellate claims based on other law have been forfeited by his failure to raise them first in the court below. The Agency also argues that we should affirm the juvenile court's denial because, contrary to the court's finding, Robert did *not* establish that he met the requirements for presumed father status pursuant to section 7611, subdivision (d) and because, in any event, the court's rebuttal finding was correct.

We conclude the case is not moot and Robert has forfeited his appellate claims regarding other law. We affirm the juvenile court's denial because Robert did not meet his burden of showing by a preponderance of the evidence that he qualified as a presumed father of Am or Az pursuant to section 7611, subdivision (d). At a minimum, there is no substantial evidence that he "received" either child into his home as required. Therefore, we affirm the juvenile court's denial of Robert's requests for presumed father status. We have no need to, and do not, reach the juvenile court's "rebuttal" ruling and the parties' related appellate arguments.

BACKGROUND

We summarize the factual and procedural background that is relevant to our resolution of this appeal.

The Agency's Petition

The mother of Am and Az has three other children with a different father, Ar. C. and S. are girls and K. is a boy. In September 2012, C., K., and S. were 13, 10, and four years old respectively, Am was almost two years old, and Az was two months old. On September 25, 2012, the Oakland Police Department took all five children into protective custody after C. said at school that she wanted to kill herself because she was fearful of

returning home, and that Robert had been molesting her for two years. The children were subsequently placed in foster homes.

On September 28, 2012, the Agency filed a petition pursuant to Welfare and Institutions Code section 300 regarding all five children. The petition, as subsequently twice amended, made allegations regarding Robert, mother, and Ar. The allegations regarding Robert were that (1) pursuant to section 300, subdivision (a), K. was at risk from the physical abuse of Robert; (2) pursuant to section 300, subdivision (b), the parents of Az had failed to adequately protect him by not providing sufficient medical treatment or exposing him to domestic violence; (3) pursuant to section 300, subdivision (d), C. and S. had been repeatedly sexually abused by Robert; (4) pursuant to section 300, subdivision (g), Am and Az were left without any provision for support from Robert; and (5) pursuant to section 300, subdivision (j), Am and Az faced a substantial risk of being abused or neglected based on the sexual abuse of C. and S., and the physical abuse of K., by Robert.

The court continued its jurisdiction/disposition hearing regarding the children numerous times. Prior to ruling on these matters, it denied Robert presumed father status regarding Am and Az. This denial is the focus of Robert's appeals.

The Court's Paternity Inquiry

On October 11, 2012, the court conducted an inquiry into Robert's paternity status regarding Am and Az. Robert's whereabouts were unknown at the time. At this inquiry, mother testified to the following: Robert was the father of both Am and Az, and mother was not aware that any paternity testing had occurred that confirmed this was the case. Mother said that Robert was present at Am's birth and to her knowledge signed a declaration of paternity at the hospital and was listed as the father on Am's birth certificate. She said Robert was present at Az's birth, to her knowledge signed a declaration of paternity at the hospital and was listed as Az's father on the birth certificate, and bought diapers, wipes, and formula for Az. No documents were presented

at the hearing. Mother denied that Robert lived with her family. She said that Robert “spend the night. He doesn’t live with us. He always have his own place.”

After mother’s testimony, the court found Robert to be the alleged father of Am and Az.

Robert’s Request for Presumed Father Status

The Agency subsequently reported that Robert had been arrested and charged with crimes related to his alleged sexual abuse of C. and S. He first appeared before the court via counsel in January 2013.

At a March 4, 2013, hearing, Robert, appearing in custody and with counsel, denied the allegations in the amended petition. His counsel requested that the court accord him presumed father status regarding Am and Az. Minors’ counsel argued against this, contending that any presumption created pursuant to section 7611, subdivision (d) was rebutted by Robert’s “repugnant behavior.” The court and counsel further discussed this matter at a March 6, 2013, hearing. The court deferred ruling on Robert’s paternity status in order to review case law cited by minors’ counsel.

In the meantime, the court began viewing video-recorded interviews of C., S., and K. conducted on September 25 and/or 26, 2012, by staff of the Child Abuse Listening, Interviewing and Coordination Center (CALICO). We now summarize these interviews and other statements by the children regarding Robert’s sexual abuse that the Agency reported to the court.

C.’s Statements

C.’s CALICO Interview

C. said Robert had molested her since she was nine years old. C. did not want to talk about Robert as her “stepdad” because it felt “weird,” and preferred to call him “Bobby” instead.

According to C., Robert first molested her on the day she met him, when she was in fifth grade. She came home and found him in her mother’s bedroom, and her mother introduced him to her as “Bobby.” That night, while she was sleeping, she felt someone

put a hand on top of her underwear and touch her “Virginia.” The next night, she woke up and saw Robert enter the room, squat, and try to touch her. She slapped him and told him to leave, which he did.

Robert kept trying to bother C., although she told him repeatedly to leave her alone. At different times, he tried to shove his thumb in her mouth while she was sleeping, she woke up to find his hand inside her underwear, and she woke up to find her pajamas had been removed and Robert was grabbing the front part of her “Virginia.”

When C. was in sixth grade, she woke up to find Robert rubbing her hip on top of her clothes. She told him to move his hand away, but he ignored her. C. told her mother about Robert’s conduct, but her mother said she was “talking nonsense.” C. denied to her father, Ar, that anyone was molesting her because she was afraid he would kill Robert and go to jail.

At some point, C.’s mother threatened to kill Robert and he stopped touching C. He went away for a time to Monterey or San Francisco, but came back. At her mother’s request, C. brought him some lunch while he was watching “nasty shows,” which C. also described as “sex things.” Robert tried to touch her again. She punched him, her mother “went off” on him, and he left again “for like a long time.”

At another point, C. told a friend’s mother that Robert was always touching and bothering her. This led to C. talking to a school counselor, but nothing was done because, C. believed, her mother denied it all. C. was disciplined by mother for talking. Later, mother believed C. and questioned Robert. He denied molesting C., and mother believed him again.

Robert would try to “reach” for C. For example, once Robert babysat the children. He stayed in the basement and smoked “weed.” When C. went down there to do laundry, he forced her to sit on his lap and kept hugging her against her will. She slapped him across his face. He kept telling her that he loved her and wanted to be her father. C. thought it made no sense because of his molestation of her, and it made her angry.

When C. was in seventh grade, Robert began molesting her again. He tried to touch her chest repeatedly; forced his hand under her shirt on her back and rubbed it as he

asked her, “ ‘Why is your back so warm and soft?’ ”; and grabbed her hand and told her to touch his “thing,” which she would not do.

In the summer after seventh grade (meaning during the months just before C.’s CALICO interview), C. said, among other things, that she once woke up with Robert lying on top of her and moving himself around on her. When she told him to leave her alone, he said he was going to come back for her. She was unable to say aloud what he specifically was doing, but wrote down for her interviewers, “ ‘He was trying to hump me.’ ” Other times, he stood in front of her and touched his “thing”; insisted that she keep her door open while she dressed and he walked in and out of her room; grabbed her bottom and said she had a nice “ass”; told her, as she listened to a song called something like “Bedrock,” that he could make her bed rock; and showed her sex videos.

C. once became angry at Robert for hitting her mother and yelled at him about touching her. Her mother hit Robert and told him not to ever touch her daughter and kicked him out, but Robert would not leave. Every time her mother kicked him out, he came back.

C. also told her interviewers that her four-year-old sister, S., told her once that Robert was trying to put his “thing” in S.’s mouth. C. did not believe her and asked S. if she was sure. S. said she was, twice. Robert also punched, pushed, and bullied K. in front of C.

C. was asked about Robert’s whereabouts. She said she did not know where he was, but thought she had heard he was in Monterey for his job. She did not know what job this was, and added that “he was a carpenter but I don’t really know because he said he lost his job.”

Other Statements by C.

The Agency reported to the juvenile court that C. made additional disclosures about Robert’s sexual abuse of her after her CALICO interview. A clinician reported that C. “indicated that [Robert] would sneak into her room every night and molest her. He has digitally penetrated her and performed oral sex on her.” C. stated in an interview

with an Agency case worker that she told her mother three times about Robert's molestation of her, but her mother did not do anything about it and lied about it to authorities. C. said she "was holding back a lot" during her CALICO interview because she was embarrassed. She said that "[Robert] used his hand and went all the way through her vagina and that it was very painful. When she woke up she was in a 'doggie style' where he was pushing himself to her while holding her." In April 2013, C. also met with the district attorney and testified at a preliminary hearing against Robert. Her reported disclosures were consistent with what she had said elsewhere.

S.'s Statements

S.'s CALICO Interview

In her CALICO interview, S. identified a boy's "thing" and his "nuts" on a drawing that was shown to her. She said Robert made her touch his "nuts" with her mouth. It made her throw up and choke. She did not tell her mother about it. Robert, who she referred to as "Bobby," lived in her home, but he was not her "daddy."

Robert also put his "thing" in her "booty." It just tickled. He took off her skirt when he did it.

S. said Robert scared her because she had seen him when he was mad. She also said her mother did not know what happened with Robert, did not care, and did not like her.

Other Statements by S.

S.'s foster mother told the Agency that S. said Robert would put his penis in her mouth and prevent her from moving away. S. subsequently told a case worker that Robert "grabbed her hair and pushed her face to his penis after he pulled down his pants and sat down. . . . She further stated that [Robert] put strawberry on his penis and then in her mouth. She indicated that it happened at night when both her mother and [C.] were sleeping. When asked why she didn't tell her mother, she responded that . . . her mother would be mad."

K.'s Statements

In his CALICO interview, K. said he lived with his mother, “stepdad,” who he identified as Robert, sisters, and brothers. Robert had been in his life for three years.

K. said C. told him that Robert had tried to touch her twice when she was sleeping. Asked about what she said, he replied that it was “hard to say because it’s very disgusting.” He then said C. told him that one time, at the end of the school year, Robert touched C. on her leg and C. said, “what are you doing” and then he left. C. also told K. the previous summer that Robert “put his thing in her private part” and thanked her the next morning “for growing.” C. told K. not to tell anyone, and he did not. The previous year, C. told their mother that Robert was touching her. Mother yelled at Robert and told him to leave, which he did.

S. never told K. anything had happened to her with Robert and he never saw anyone touch her in a way that made him feel uncomfortable. K. said he had never been touched in such a way.

The Agency’s Additional Reports

The Agency filed several reports with the juvenile court in the months leading up to the court’s determination of Robert’s paternity status that contained information relevant to our resolution of this appeal.

The Agency reported that at first, mother said she believed C. was lying in order for the family to get back with Ar, her former husband, who had physically abused mother, and that Ar had told the children to lie about Robert. She said that she spoke with Robert the night the children were removed and advised him to turn himself in. She believed that if he were innocent he should not be hiding and should turn himself in, but since he had vanished, he did not “want to be bothered.”

Mother subsequently said she believed C.’s allegations. After at first denying that C. had told her previously about Robert’s molestations, mother acknowledged that C. had done so two years before. C.’s paternal grandmother also said C. had told her about abuse two years before, but that mother would not listen.

Mother told the Agency that “she is not in a relationship with [Robert] now and he only comes to visit. When he visits, they don’t even sleep together. He sleeps in a different room. . . . She described her relationship with [Robert] as just having two kids with him. She stated that [Robert] doesn’t live with her and only comes by to drop off diapers and formulas for the babies [and that] she had to pay him to babysit.”

The Agency also reported that the children’s maternal grandmother told a case worker that “mother has kicked [Robert] out before but she allows him to come back. The mother is aware that if [Robert] is in the home then the family will not visit because [Robert] has only negative things to say and doesn’t even help the mother pay the bills.”

Further, the Agency reported that Robert’s adoptive father said he was not interested in building a relationship with Am and Az “since he has never met the children. . . . Since [Robert] has never involved him and his wife with his children he doesn’t want to start at this point in time.”

The Parties’ Briefing Regarding Robert’s Paternity Status

The parties briefed the issue of Robert’s paternity status for the court after the March 6, 2013, hearing. Robert argued that he qualified for presumed father status based on section 7611 (section 7611), subdivisions (c)³ and (d). Section 7611, subdivision (d) states that a person is presumed to be the natural parent of a child if “[t]he presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.” Robert contended the record showed that he and mother had lived together for more than two years at the time the children were removed, he was present at Am’s and Az’s births and named on their birth certificates, and K. referred to him as a “stepdad.” Robert further contended that he helped support the family. He pointed to C.’s statement in her CALICO interview that he worked as a carpenter during the time he

³ By its own terms, section 7611, subdivision (c) applies only to those circumstances when the presumed parent and the child’s natural mother marry, or attempt to marry, each other after the child’s birth. There is no evidence that Robert and mother attempted to or did marry each other, and on appeal Robert does not argue that he established presumed father status under this provision. Therefore, we do not discuss it further.

lived with the family and mother's testimony at the paternity hearing that she received "financial support" from him, an apparent reference to mother's testimony that Robert bought diapers, wipes, and formula for Az.

The Agency argued that Robert was not entitled to presumed father status because the documentation of his paternity was insufficient by itself to entitle him to that status, the evidence that he lived with the family was vague, and nothing indicated he provided support for the minors or held them out as his own during that time. Also, mother testified that Robert did *not* live with her and that he maintained his own residence.

Counsel for the minors argued that, while Robert might qualify as a presumed father under *In re T.R.* (2005) 132 Cal.App.4th 1202, this presumption was rebutted by his repugnant and abusive behavior.⁴ Robert responded that *In re T.R.* was not dispositive because the father in that case allegedly had sexually abused the stepdaughter for whom he sought presumed father status, while in the present case Robert was not accused of sexually abusing Am or Az.

The Court Denies Robert's Request for Presumed Father Status

The juvenile court finished viewing the videos of the children's CALICO interviews at a hearing held on June 11, 2013. The court indicated it had reviewed the briefing regarding Robert's paternity status, heard argument from counsel, and recessed the hearing for about a half hour to conduct additional research. It then announced its ruling, as follows: "First of all, I believe that [Robert] does meet the presumption of presumed father. All the elements are there in accordance with [section]

⁴ The *T.R.* court found that a father's sexual molestation of the stepdaughter for whom he sought presumed father status, and a sexual predator criminal record that he hid from the stepdaughter's mother, were grounds for rejecting his request for presumed father status pursuant to section 7611, subdivision (d) because the father's conduct "was antithetical to a parent's role and was a blatant violation of parental responsibilities." (*In re T.R.*, *supra*, 132 Cal.App.4th 1202, 1208, 1211.)

7611[, subdivision (d)].^[5] He has held the child out in the community, as far as we know. He has lived with the two younger . . . children. He has met the presumption.”

The court then concluded this presumption was rebutted by Robert’s sexual abuse of C. and S., pursuant to *In re T.R.* The court highlighted that “ ‘[p]aternity presumptions are driven not by biological paternity but by the State’s interest in the welfare of the child and the integrity of the family.’ ” (*In re T.R., supra*, 132 Cal.App.4th at p. 1209.) It concluded: “The actions of [Robert] are antithetical to the integrity of a family. He is not acting as a parent that meets the interests of the State to create families of integrity. The presumption of presumed father status has been rebutted. He is not entitled to presumed father status.” The court ruled that he would remain as an alleged father.

On August 7, Robert filed notices of appeal in Am’s and Az’s dependency cases regarding the juvenile court’s June 11, 2013, ruling.

Subsequent Events

The Agency reported to the court that on September 26, 2013, Robert pled guilty to continuous sexual abuse of a child, C., in violation of Penal Code section 288.5, and was sentenced to 12 years in prison. The Agency also reported that a 10-year stay-away order was issued, presumably barring Robert from any contact with any of the children or mother during that time.

Robert appeared in custody at the December 9, 2013, jurisdiction hearing. He again requested presumed father status. The court declined to rule on his request in light of his appeal of its prior ruling on the issue. The court also declined to accept his JV-505 form, a statement regarding parentage.

For much of 2013, Am and Az were placed with mother, while C., K., and S. were in foster care. By the end of 2013, mother had satisfied the Agency’s concerns. She

⁵ The hearing transcript states that the juvenile court referred here to section 7611, subdivision (b), which by its own terms applies to those circumstances when the presumed parent and a child’s natural mother have attempted to marry before the child’s birth. No one argued this provision applied in the present case. It is apparent from the court’s comments that it was intending to refer to section 7611, subdivision (d).

agreed with the Agency recommendations and withdrew her contest. The court sustained as true the section 300 petition allegations, as amended. The children were adjudged to be dependents and placed with mother, with family maintenance services provided to her. The court maintained its previous order denying Robert presumed father status and designating him as an alleged father.

On December 19, 2013, Robert filed notices of appeal regarding the court's orders at the December 9 hearing in Am's and Az's dependency cases.

During the pendency of this appeal, the Agency requested that we take judicial notice of the juvenile court's "Custody Order—Juvenile—Final Judgment" regarding Am and Az, filed on May 22, 2014. We granted this unopposed request. The court's ruling found that mother is the parent of Am and Az, has legal and physical custody of them, and that Am and Az have their primary residence with her. The court terminated jurisdiction over Am and Az.

Robert subsequently filed a request that we take judicial notice of a notice of appeal that he filed the following week from the juvenile court's May 22, 2014, ruling. This request is also unopposed. We hereby grant it.

Robert has also moved to strike portions of respondent's brief that refer to certain matters told to the court during a confidential hearing on a motion by Robert during the dependency proceeding to replace his counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. These portions refer to statements by Robert about welfare and weight loss, and are contained in pages 62 and 63 of the Agency's respondent's brief. Robert's motion to strike is based on the grounds that the matters cited were discussed in a confidential setting regarding a motion not appealed from and are not appropriate to cite in this appeal. We hereby grant Robert's motion and do not consider those portions of the Agency's brief.

DISCUSSION

I. *The Agency's Mootness Argument*

Before addressing the merits of Robert's appeals, the Agency first asserts that they are moot and should be dismissed for two reasons. We disagree.

First, the Agency argues that, since Robert did not object to the court's May 22, 2014, final judgment giving sole legal and physical custody of Am and Az to mother and terminating jurisdiction to Am and Az, he has waived any appellate claim regarding them. As Robert points out, the Agency, although the party requesting dismissal, has not provided a record of the proceedings leading up to the court's May 22 ruling. Without them, we cannot determine whether or not Robert waived any appellate claim. Therefore, the Agency's argument is unpersuasive. (See *Potrero etc. L. Co. v. All Persons, etc.* (1909) 155 Cal. 371, 372 [the party moving to dismiss the appeal has the burden to show from the record that the grounds for dismissal exist].)

Second, the Agency argues that since Robert has not filed an appeal to challenge the court's May 22, 2014, ruling, it has become final, rendering Robert's appeals of the court's paternity rulings moot. The Agency relies on *In re Michelle M.* (1992) 8 Cal.App.4th 326 for this argument. However, as we have discussed, Robert *has* appealed the judgment in this case, distinguishing his circumstances from *Michelle M.* Therefore, we reject this argument as well.

II. *Robert's Forfeiture of Certain Appellate Claims*

Before arguing that the court erred in denying him presumed father status pursuant to section 7611, subdivision (d), Robert argues he is entitled to presumed father status pursuant to section 7570 et seq.⁶ and California Rules of Court, rule 5.635(c).⁷ The

⁶ Robert specifically relies on section 7573, which states in relevant part that, subject to certain exceptions not argued to apply here, "a completed voluntary declaration of paternity . . . that has been filed with the Department of Child Support Services shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction. The voluntary declaration of paternity shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support."

Agency argues that Robert has forfeited any appellate claim based on these provisions by his failure to first raise them below. The Agency is correct.

A. The Relevant Proceedings Below

We have reviewed the proceedings below and find no indication that Robert argued he was entitled to presumed father status based on section 7570 et seq. or California Rules of Court, rule 5.635(c).

At the March 4, 2013, hearing, Robert's counsel first requested that Robert be given presumed father status regarding Am and Az. His counsel referred to mother's testimony at the paternity inquiry that Robert was present at the birth of the children and signed a declaration of paternity, and indicated counsel had other evidence to present, which he did not specify.

Minors' counsel said that Robert was "on at least" Am's birth certificate. The Agency's counsel indicated it had a copy of that birth certificate, which appears to have been shown to the court during this March 4, 2013, hearing, but was neither offered nor admitted into evidence. Minors' counsel argued against Robert being given presumed father status on the ground that any presumption created pursuant to section 7611, subdivision (d) was rebutted based upon Robert's "repugnant behavior."

The court, at Robert's counsel's suggestion, deferred ruling on Robert's paternity status in order to review the case law cited by minors' counsel. At the next hearing, on March 6, 2013, the court again referred to Robert's presumed father status and asked if there was a "shortcut," "[l]ike birth certificates?" The Agency's counsel replied that mother that day had submitted for counsel's review a declaration of paternity from the

⁷ California Rules of Court, rule 5.635(c) states, "If a voluntary declaration . . . has been executed and filed with the California Department of Social Services, the declaration establishes the paternity of a child and has the same force and effect as a judgment of paternity by a court. A man is presumed to be the father of the child under Family Code section 7611 if the voluntary declaration has been properly executed and filed."

hospital for Az with Robert's signature on it. This document appears to have been shown to the court, but also was neither offered nor admitted into evidence.

Robert's counsel confirmed to the court that he was seeking to have Robert elevated to presumed father status, and made no further argument. Minors' counsel argued that "the presumption of paternity created by [Robert's] signature on the voluntary declaration of paternity, which does give rise to a presumption under [section] 7611[subdivision] (a)," was rebutted pursuant to *In re T.R.* and that this same rebuttal applied to any presumption found under section 7611, subdivision (b).⁸ Robert's counsel argued the present case was distinguished from the cases cited. He concluded: "Neither of those cases have anything similar with the facts in the case. In this case, [Robert] is the father of two children. He's listed in the declaration as the father, and he has lived with these minors and the mother during the time since they were born." The court indicated it was not yet prepared to rule on the matter.

We have already summarized the parties' briefing on the issue of Robert's paternity status. Robert argued in his brief that he qualified for presumed father status, citing provisions in sections 7611, subdivisions (c) and (d).

At the June 11, 2013, hearing, the juvenile court indicated it had reviewed the briefing and invited Robert's counsel to augment the record. Counsel replied that she had stated her position in her brief and had nothing to add. After counsel and the court discussed a recent California Supreme Court decision in which it was held that male children are at risk in the home where a female child has been molested,⁹ mother, in response to the court's question, stated that Robert was listed as the father on the birth

⁸ These references to section 7611, subdivisions (a) and (b) are curious because they were not relied on by Robert's counsel. Further, subdivision (a) by its own terms applies only to a presumed parent who was, or had been, married to the child's mother; subdivision (b) by its own terms applies only when the presumed parent attempts to marry the child's mother before the child's birth. There is no evidence in the record that Robert either married or attempted to marry mother at any time.

⁹ The case was not specifically identified beyond a reference to "*In re L.P.*" Our independent research indicates it is likely *In re I.J.* (2013) 56 Cal.4th 766.

certificates of both Am and Az. The Agency's counsel then contended that mother testified previously that Robert was on the birth certificate of Am, she did not testify as to the birth certificate of Az, and there was a declaration of paternity from the hospital regarding Az.

The discussion then turned to minors' counsel's position that any presumption of presumed father status was rebutted by Robert's sexual abuse of C. and S. Robert's counsel argued there was no rebuttal because Robert was not requesting presumed father status for a child he was alleged to have abused. He said, "I am submitting that [Robert] does qualify for presumed father status, because I think there's ample evidence that he lived in the home with the children. The children have testified to that. I mean in the [CALICO] tape, the children stated that. And also, the mother testified . . . that [Robert] was listed in both birth certificates of the boys, and signed the paternity declaration."

After argument from the other counsel, the court said, "Seems to me, sitting here now for four-plus years, that we never get this deep into whether or not a father develops a parental relationship with the child, once we establish that the documentation is in order, and we have established the documentation being in order here. Declaration of paternity, birth certificates. Why are we moving on, unless we are bringing in [*In re L.P.*] at this point?"

Robert's counsel stated in response, "I think the comments by the Court are very important. We've established that [Robert] was at the hospital. I believe that minors' counsel sort of changed the standard at this point to fit the pattern of [Robert]. He was at the hospital. . . . He's the father. . . . And he signed the paperwork. He signed the birth certificate. He was in the children's lives. He was present. He was there. He was the father. He would like to support the family." Robert's counsel also referred to comments by K. that he knew what Robert did for work, arguing that it went "to the level of the presence of [Robert] in the family, conversations had, held in the family home, about [Robert's] work."

The court asked, assuming Robert may have supplied money to the family household, "[W]hat else did he do except for being around in the house, with these two

children?” Robert’s counsel replied, “I think we would have to rely on probably what the mother would say, which, you know, I’m not so sure that, that we could. [¶] Talking to what she says, my argument, Your Honor, he was in the home. He was the father. He has qualified under the documentation. And as the Court has stated, that once documentation has been established, which has been established in this case, then the issue then goes, really, to his presence in the home on a general basis. [¶] Residence in the home was—he was in the home. He worked. He supported the family. He was a father. He was a father.”

The court heard additional argument, conducted further research, and denied Robert presumed father status, as we have already summarized.

B. Analysis

As the Agency points out, a party is generally precluded from raising issues on appeal that are not first raised in the juvenile court. “In dependency litigation, nonjurisdictional issues must be the subject of objection or appropriate motions in the juvenile court; otherwise those arguments have been waived and may not be raised for the first time on appeal.” (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.)

Robert has not pointed to anything in the record indicating that he argued below that he was entitled to presumed father status pursuant to section 7570 et seq., section 7573, or the California Rules of Court, rule 5.635(c), nor have we found from our own review of the record that he did so. To the contrary, Robert cited only section 7611, subdivisions (c) and (d) as the bases for his request in his briefing to the court. When his counsel was given the opportunity by the court to add to these arguments at the June 11, 2013, hearing, she declined to do so.

Further, Robert relied only on 7611, subdivision (d) for his argument at the June 11, 2013, hearing, which was the only provision relied on by the court in concluding that Robert had raised a rebuttable presumption of presumed father status. Section 7611, subdivision (d) affords presumed parent status to a person who both “receives the child into his or her home” and “openly holds out the child as his or her natural child.” As we

have discussed, at the hearing Robert’s counsel argued, “He was the father. He has qualified under the documentation. And as the Court has stated, that *once documentation has been established, which has been established in this case, then the issue then goes, really, to his presence in the home on a general basis.* [¶] *Residence in the home was—he was in the home. He worked. He supported the family.* He was a father. He was a father.” (Italics added.) Counsel would have no need to argue Robert was present in the home and supported the family if Robert were relying on section 7570 et seq. or California Rules of Court, rule 5.635(c). As we will discuss, these are contentions that relate directly to section 7611, subdivision (d).

Robert points out the numerous times his counsel referred to Robert’s claimed execution of declarations of paternity. However, as indicated by our extensive review of the parties’ briefing to the court and their oral argument at the June 11, 2013, hearing, these references were made in the course of his counsel’s argument that he met the requirements for presumed father status under section 7611 and, based on his counsel’s additional references to Robert’s living with, and support of, the family, specifically pursuant to section 7611, subdivision (d). Such assertions are appropriate to section 7611, subdivision (d) analysis because they relate to whether father held out Am and Az to be his natural children. However, they were not sufficient to preserve an appellate claim regarding such status under any other provision.¹⁰

Robert never argued below, nor asked the court to rule, that he qualified for presumed father status pursuant to section 7570 et seq. or California Rules of Court, rule 5.635(c). The court never ruled on their applicability. Nor did Robert offer the critical

¹⁰ We note that section 7611 begins with references to sections 7540 et seq. and 7570 et seq., but nothing in the record indicates Robert invoked these references either. Specifically, section 7611 begins, “A person is presumed to be the natural parent of a child if the person meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions”

documents into evidence.¹¹ Therefore, Robert has forfeited his appellate claim regarding them.

III. The Court's Denial of Robert's Request for Presumed Father Status

We discuss the merits of Robert's appeal mindful that “ ‘ “[t]he fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.” ’ ’ ” (*In re Sarah M.* (1991) 233 Cal.App.3d 1486, 1494-1495.)

We apply this rule here and affirm the juvenile court's denial of Robert's request for presumed father status on a different ground than that relied upon by the juvenile court. Contrary to the juvenile court's finding, we conclude that, as the Agency argued below and argues again in this appeal, Robert did not present sufficient evidence to establish by a preponderance of the evidence that he qualified as a presumed father under section 7611, subdivision (d).

A. Relevant Legal Standards

In dependency proceedings, “fathers” are divided into several different categories.

¹¹ This is particularly significant because pursuant to section 7573, and subject to certain exceptions, a voluntary declaration of paternity filed with the Department of Child Support Services “shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity The voluntary declaration of paternity shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support.” If Robert had intended to argue for presumed father status based on section 7573, he should have at a minimum offered into evidence all relevant birth certificates and declarations of paternity. (Cf. *In re Raphael P.* (2002) 97 Cal.App.4th 716, 736-739.) Mother's testimony that “to her knowledge” Robert signed such documents was at best equivocal.

“ ‘The extent to which a father may participate in dependency proceedings and his rights in those proceedings are dependent on his paternal status.’ ” (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 159.) An alleged father is not entitled to appointed counsel or reunification services, and due process requires only that he “ ‘be given notice and “an opportunity to appear and assert a position and attempt to change his paternity status.” ’ ” (*Ibid.*) A presumed father is eligible to have custody of his children, appointed counsel, and reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1410; Welf. & Inst. Code, §§ 317, 361.2, subd. (a), 361.5, subd. (a).)

“A natural father is one who has been established as a child’s biological father. [Citation] [¶] ‘Presumed fatherhood, for purposes of dependency proceedings, denotes one who “promptly comes forward and demonstrates a full commitment to . . . paternal responsibilities—emotional, financial, and otherwise.” ’ [Citation.] A natural father can be a presumed father, but is not necessarily one; and a presumed father can be a natural father, but is not necessarily one.” (*In re A.A.* (2003) 114 Cal.App.4th 771, 779.)

“ ‘The statutory purpose [of section 7611] is to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.’ ” (*In re T.R.*, *supra*, 132 Cal.App.4th at p. 1209.) As stated in a recent opinion by the Third Appellate District, “[A] presumed parent is not . . . even a long-term boyfriend or girlfriend, but someone who has entered into a familial relationship with the child: someone who has demonstrated an abiding commitment to the child and the child’s well-being.” (*E.C. v. J.V.* (2012) 202 Cal.App.4th 1076, 1085.)

Under section 7611, “a man who has neither legally married nor attempted to legally marry the mother of his child cannot become a presumed father unless he *both* ‘receives the child into his home *and* openly holds out the child as his natural child.’ . . . Therefore, to become a presumed father, [he] must not only openly and publicly admit paternity, but must also physically bring the child into his home.’ ” (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652, quoting § 7611, subd. (d).) Courts have considered a

number of factors in determining whether a father has met both elements of section 7611, subdivision (d). (*In re T.R.*, *supra*, 132 Cal.App.4th at p. 1211.)

We apply a substantial evidence standard to our review of the juvenile court's initial finding that the presumption of presumed father status was met pursuant to section 7611, subdivision (d). (*In re Spencer W.*, *supra*, 48 Cal.App.4th at p. 1653.) That is, "we review the facts most favorably to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the order. [Citation.] We do not reweigh the evidence but instead examine the whole record to determine whether a reasonable trier of fact could have found" as decided. (*Id.* at p. 1650.)¹²

B. Analysis

The juvenile court determined that Robert showed he had received Am and Az into his home because, as the court stated it, "He has lived with the two younger . . . children." This is not the standard. Section 7611, subdivision (d) explicitly requires that Robert, as a man who has neither married nor attempted to marry mother, specifically "receive" Am and Az into *his* home. We conclude there is no substantial evidence that he physically or otherwise did so. Therefore, Robert did not meet his burden of showing he met this requirement.

1. *There Is No Substantial Evidence That Robert Physically Received Am or Az Into His Home*

A man who has neither married or attempted to marry the mother cannot "constructively receive a child into his home within the meaning of [section 7611, subdivision (d)], . . . but must also *physically* bring the child into his home." (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051; *Glen C. v. Superior Court* (2000) 78

¹² The Agency, citing *In re Spencer W.*, *supra*, 48 Cal.App.4th at p. 1653, argues our standard of review "should be whether the evidence here would permit a trier of fact to conclude that not all of the foundational elements necessary to establish presumed father status are present." This is a misreading of *In re Spencer W.* The discussion cited makes sense because the court was conducting a substantial evidence review of the juvenile court's *rejection* of a claim of presumed father status. We, on the other hand, apply the substantial evidence standard here to review the juvenile court's conclusion that Robert *did* meet his burden under section 7611, subdivision (d).

Cal.App.4th 570, 585; *In re Spencer W.*, *supra*, 48 Cal.App.4th at p. 1652.) There is no substantial evidence that Robert did so.

Initially, there is no substantial evidence that mother's home was Robert's home. Mother's home was established before Robert appeared on the scene, as C. stated that she first met Robert when he appeared one day in their home. Mother testified that Robert, while he spent nights at her home, did not live with her family and always maintained his own residence. She also told the Agency shortly after the petition was filed that she was not presently in a relationship with Robert, that he "only comes to visit" and that he "comes by to drop off" diapers and formula. Mother's testimony was never contradicted. Indeed, Robert's counsel conceded at the June 11, 2013, hearing when asked what Robert did around the house that he would have to rely on what the mother said.

There also is no evidence that Robert did anything to claim mother's home as his own. For example, nothing indicates that he contributed anything financially or otherwise to mother's home, such as payment of any part of rent or utilities expenses, received any mail there, or held mother's home out to anyone as his own. In fact, the only evidence that we have found on the issue indicates he did not contribute financially: the Agency reported that the maternal grandmother said Robert "doesn't even help the mother pay the bills."

Further evidence that mother's home was not Robert's is contained in C.'s CALICO interview statements that mother repeatedly threw him out of the home, as well as in similar statements by K. and the maternal grandmother. Also, these statements show Robert did not stay continuously at mother's home in the years prior to the Agency's filing of the petition. Indeed, C. indicated that in one instance he stayed away "a long time." Again, none of this evidence was contradicted.

Robert emphasizes the statements of C., S., and K. in their CALICO interviews that Robert "lived" with them. The court did not infer, and we do not think it appropriate to infer, from this evidence that Robert made the mother's home his own. Rather, the context of the interviews indicate the children used this term in a general sense without consideration of whether Robert claimed their mother's home as his own or kept a

paternity for both, and was present at their births. However, because the evidence does not show Robert cared for Am or Az after their births, the evidence of his acknowledgment at the time of their births does not suffice to demonstrate Robert's full commitment to care for Am or Az.¹³

There is no substantial evidence that Robert's conduct met the factors identified as relevant in *In re T.R.* Specifically, there is no substantial evidence that Robert actively helped mother in prenatal care, paid any pregnancy or birth expenses, promptly took legal action to maintain custody of Am or Az when they were removed from mother's home, provided for them at any time, cared for, or pursued public benefits on behalf of either child, or that his care for them (such as by providing diapers, wipes, and formula, or babysitting for money) was more than incidental.

Indeed, Robert does not cite to anything in the record, and we have not found anything, indicating he played any active day-to-day role in caring for Am or Az financially, emotionally, or otherwise. The only evidence that Robert did *anything* to contribute to Am's or Az's well-being after their birth is mother's statements that he brought by diapers, wipes, and formula. While there was also evidence that he "babysat," mother testified she had to pay him to do so. This hardly indicates a sense of parental responsibility for, or a full commitment to, Am and Az. This is particularly true when

¹³ As we have discussed, Robert, despite having ample opportunity to do so, did not offer into evidence any declarations of paternity or birth certificates, and he relied on section 7611, subdivision (d). Therefore, we make no ruling regarding the legal propriety or effect of any such documents. Nothing herein should be construed as such if any of these documents are found to exist in the future. We conclude that Robert did not meet the burden he assumed in the dependency proceedings of establishing that he qualified for presumed father status pursuant to section 7611, subdivision (d), and nothing more.

Also, Robert's failure to meet this burden in the dependency proceedings does not necessarily relieve him from all obligations to Am or Az. (See, e.g., *Pangilinan v. Palisoc* (2014) 227 Cal.App.4th 765, 772, fn. 6 ["In the dependency context, a man acquires rights by achieving presumed father status. In the child support context, the issue is not rights but obligations, and presumed father status is not determinative of a man's obligations"]; *In re Joshua R.* (2002) 104 Cal.App.4th 1020, 1027 ["In many cases involving alleged fathers, the question of [biological] paternity is undeniably relevant, for example, in cases concerning child support or inheritance rights"].)

one considers the only evidence of his conduct during his babysitting, which was C.'s statement in her CALICO interview that he stayed in the basement, smoked "weed," forced her to sit on his lap, and kept hugging her against her will.

Indeed, the affirmative evidence of Robert's conduct when the children were removed from mother's home indicates he did *not* have a full commitment to care for Am and Az. Rather than promptly seeking legal custody of them, he abandoned them for several months. Mother's statements to the Agency that she spoke to Robert the night the children were removed indicate he was aware of the circumstances. Yet his whereabouts were unknown for more than three months. Nothing indicates he did anything on behalf of Am or Az, or sought to obtain custody of them, during this time. He was absent altogether from the court's October 2012 paternity inquiry, and his first appearance through counsel in the juvenile court was not until January 2013. He did not request presumed father status until March 2013, two months after he had been taken into custody and more than five months after the children were removed from mother's home.

Robert argues that it was unreasonable to expect that the Agency would have released the boys into Robert's custody anyway, given the allegations of sexual abuse. This is beside the point, which is that Robert's hiding, and his abandonment of Am and Az for months after their removal, is the opposite of the full commitment to children's well-being that is at the core of a section 7611, subdivision (d) inquiry.

In short, there is no substantial evidence that Robert physically or otherwise received Am or Az into his home. At most, there was evidence that he acknowledged his biological paternity at the time of their births, was mother's boyfriend for a time, dropped off some diapers and the like at times, and stayed at mother's home when she allowed him to do so. This is insufficient to establish that he "received" Am or Az into his home under section 7611, subdivision (d). Therefore, we affirm the juvenile court's denial of

Robert’s request for presumed father status, although for a different reason than that relied on by the court. (See *In re Sarah M.*, *supra*, 233 Cal.App.3d at pp. 1494-1495.)¹⁴

DISPOSITION

The rulings appealed from are affirmed.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.

¹⁴ Because we conclude there is no substantial evidence that Robert “received” Am or Az into his home, we have no need, and do not, determine whether he sufficiently held Am and Az out as his own. We note, however, that Robert does not cite any evidence indicating that he held them out as his own children after their births to anyone outside mother’s family. To the contrary, Robert’s adoptive father’s statements to the Agency that he and his wife had never met Am and Az raise an inference that Robert did not do so.